

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRANK LAZOS,	No. C 07-01736 CW
Petitioner,	ORDER DENYING
	RESPONDENT'S MOTION
v.	TO DISMISS
SHEILA E. MITCHELL, Chief Probation Officer, Santa Clara County Probation Department,	
Respondent.	

Petitioner Frank Lazos, a state probationer who was in the custody of the Santa Clara County Probation Department at the time he filed his petition, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent moves to dismiss the petition based on untimeliness. Petitioner opposes the motion to dismiss. Respondent has not filed a reply. Having considered all the papers filed by the parties, the Court denies Respondent's motion to dismiss.

BACKGROUND

On February 14, 2005, a jury convicted Petitioner of second degree robbery and petty theft. On April 5, 2005, the judge suspended the imposition of sentence and placed Petitioner on probation for three years. At trial, Petitioner was represented by

1 Deputy Public Defender Susannah Shamos. In a declaration, Ms.
2 Shamos states:

3 I have no specific recollection of speaking with Mr.
4 Lazos about an appeal, but believe I must have discussed
5 it with him as this was something I discussed with all my
6 jury trial clients. . . . I left the Public Defender's
7 Office on April 11, 2005. Mr. Lazos was sentenced on
8 April 5, 2005. I was in trial on another case at the
9 time but I did appear at Mr. Lazos's sentencing.
10 However, I did not file a notice of appeal that day, or
11 in the following few days that I still worked there.
12 When I left the office, I was advised that once my leave
of absence started, I should not return for any follow-up
13 matters. I believe that I asked another attorney in my
14 office, my supervisor who was to assign my remaining
15 sentencings, to assure that a notice of appeal was filed
16 in Mr. Lazos's case. I have since learned that no notice
17 of appeal was ever filed in Mr. Lazos's case. This is
18 through no fault of Mr. Lazos, as I believe I advised him
19 that it was in no way his responsibility to file the
20 notice, nor to follow up on it.

21 Shamos Dec. ¶¶ 3-5.

22 Petitioner submits a declaration in which he states:

23 When I was sentenced, [my counsel] told me she would file
24 a notice of appeal in my case. She told me an appeal
25 would take about 18 months. A petition to revoke my
26 probation was filed February 1, 2006. I admitted the
27 probation violation that day. I was continued on
28 probation with new condition [sic]. A different attorney
from the Public defender's [sic] office represented me.
Based on Ms. Shamos's representation, I assumed my appeal
was still ongoing. I assumed she kept her promise and
filed a notice of appeal in my case. On March 27, 2006,
I called the Sixth District Appellate Program to inquire
about the status of my appeal. I was told there was no
appeal pending in my case. This was the first time I
learned Ms. Shamos had not kept her promise to file a
notice of appeal in my case. Since I learned no notice
of appeal was filed in my case I have been working with
the Sixth District Appellate Program to try and regain my
right to appeal. I always wanted to appeal my conviction
after a jury trial. Ms. Shamos and I discussed the
matter and she said she would file a notice of appeal. I
relied on her promise. I have been deprived of an appeal
I wanted by her failure to file the required notice.

Petitioner Dec. ¶¶ 2-5.

1 On May 16, 2006, Paul Couenhoven, an attorney employed by the
2 Sixth District Appellate Program, on behalf of Petitioner, filed in
3 the California court of appeal an application for relief from
4 default for failure to file a timely notice of appeal. The basis
5 for the application was that trial counsel provided ineffective
6 assistance of counsel, in violation of Petitioner's Sixth Amendment
7 right to counsel, when she promised to file a notice of appeal but
8 did not do so. On June 28, 2006, the court of appeal denied his
9 application. Mr. Couenhoven submits a declaration in which he
10 states that, after the application was denied, he attempted to
11 track down Ms. Shamos to verify what Petitioner had told him.
12 Although he diligently attempted to find her, Mr. Couenhoven did
13 not speak with Ms. Shamos until October 24, 2006.

14 On November 28, 2006, Petitioner filed a petition for a writ
15 of habeas corpus in the California Supreme Court, again arguing
16 that his Sixth Amendment right to counsel was violated by trial
17 counsel's failure to file a notice of appeal after promising to do
18 so. On January 24, 2007, the California Supreme Court denied the
19 petition. On March 27, 2007, Petitioner filed the instant petition
20 for a writ of habeas corpus.

21 LEGAL STANDARD

22 Under the Antiterrorism and Effective Death Penalty Act
23 (AEDPA), a district court may grant a petition challenging a state
24 conviction or sentence on the basis of a claim that was
25 "adjudicated on the merits" in state court only if the state
26 court's adjudication of the claim: "(1) resulted in a decision that
27 was contrary to, or involved an unreasonable application of,

1 clearly established Federal law, as determined by the Supreme Court
2 of the United States; or (2) resulted in a decision that was based
3 on an unreasonable determination of the facts in light of the
4 evidence presented in the State court proceeding." 28 U.S.C.
5 § 2254(d).

6 The AEDPA imposes a one-year statute of limitations on
7 petitions for a writ of habeas corpus filed by state prisoners.
8 Petitions filed by prisoners challenging non-capital state
9 convictions or sentences must be filed within one year of the
10 latest of the date on which: (A) the judgment became final after
11 the conclusion of direct review or the time passed for seeking
12 direct review; (B) an impediment to filing an application created
13 by unconstitutional state action was removed, if such action
14 prevented petitioner from filing; (C) the constitutional right
15 asserted was recognized by the Supreme Court, if the right was
16 newly recognized by the Supreme Court and made retroactive to cases
17 on collateral review; or (D) the factual predicate of the claim
18 could have been discovered through the exercise of due diligence.
19 28 U.S.C. § 2244(d)(1). Time during which a properly filed
20 application for state post-conviction or other collateral review is
21 pending is excluded from the one-year time limit. 28 U.S.C.
22 § 2244(d)(2).

23 A habeas petition can be timely even if filed after the one-
24 year period if statutory or equitable tolling applies. Harris v.
25 Carter, 515 F.3d 1051, 1054-55 n.4 (9th Cir. 2008) (holding
26 equitable tolling applies to habeas petitions, although recognizing
27 that Supreme Court has not decided the issue); Barrow v. Marshall,

1 2008 WL 1969325, *2 (C.D. Cal). In deciding whether a petition is
2 timely, a court should first address whether it is timely under the
3 one-year statute of limitations. Id. If it is not, the next step
4 is to address whether statutory tolling applies; the final step is
5 to determine whether equitable tolling applies. Id.

6 DISCUSSION

7 I. One-Year Statute

8 The parties agree that Petitioner had until June 4, 2005, or
9 sixty days after entry of the order placing him on probation, to
10 file his notice of appeal. Because Petitioner did not file a
11 notice of appeal, AEDPA's one-year statute of limitations began to
12 run on that date and thus the petition should have been filed by
13 June 4, 2006. Petitioner filed his habeas petition on March 27,
14 2007. The parties do not dispute that the petition is facially
15 untimely. Therefore, unless statutory or equitable tolling
16 applies, the petition must be dismissed.

17 II. Statutory Tolling

18 Statutory tolling applies to a habeas petition during the
19 pendency of a properly filed application for state collateral
20 review. 28 U.S.C. § 2244(d)(2). Respondent concedes, for purposes
21 of this proceeding, that Petitioner's May 16, 2006 application for
22 relief from default for failure to file a timely notice of appeal
23 is the functional equivalent of an application for collateral
24 review. Therefore, the federal limitations period was tolled from
25 May 16 to June 28, 2006, the date the state court of appeal denied
26 Petitioner's application for relief from default. But, according
27 to Respondent, because 345 days had passed from the expiration of
28

1 the date to file a notice of appeal to the date Petitioner filed
2 the application for relief from default, Petitioner had only twenty
3 days of the one-year period to file his habeas petition. According
4 to Respondent, Petitioner did not file his petition in the
5 California Supreme Court until November 22, 2006, after another 146
6 days had passed and the one-year period for filing a habeas
7 petition had run. The state supreme court denied the petition on
8 January 24, 2007, or sixty-three days after it was filed.
9 Petitioner filed his federal habeas petition on March 27, 2007,
10 sixty-two days later. Therefore, according to Respondent,
11 Petitioner filed his federal petition 189 days after the one-year
12 statute of limitations had expired.

13 Petitioner disputes Respondent's calculation regarding
14 statutory tolling and argues that he is entitled to 146 days of
15 tolling for the "gap" between the appellate court's denial of his
16 habeas petition and the filing of his petition in the California
17 Supreme Court.¹ However, he indicates that the Court need not
18 decide this issue because he is entitled to equitable tolling for
19 242 days, from June 4, 2005, the last day to file a notice of
20 appeal, to February 1, 2006, the date he went to court with an
21 attorney from the Public Defender's Office for the hearing on his
22 probation violation.² According to Petitioner, when these 242

23
24 ¹The Court notes that even if Petitioner is correct and he is
25 entitled to 146 days of statutory tolling, his federal petition
would still not be timely filed. Therefore, the Court does not
address this issue.

26 ²Petitioner proposes February 1, 2006 as the date equitable
27 tolling ends in the event the Court agrees with Respondent that
Petitioner should have asked his attorney at the probation

1 days are deducted from the 553 days that proceedings were pending
2 in state court, he timely filed his petition within 311 days of the
3 date the one-year statute started running. Respondent argues
4 equitable tolling does not apply because Petitioner can show only
5 that his attorney was negligent in not filing a notice of appeal.

6 III. Equitable Tolling

7 A. Legal Standard

8 The Supreme Court has "never squarely addressed the question
9 whether equitable tolling is applicable to AEDPA's statute of
10 limitations," Pace v. DiGuglielmo, 544 U.S. 408, 418 n.8 (2005),
11 but the Ninth Circuit holds that the one-year limitation period can
12 be equitably tolled because § 2244(d) is a statute of limitations
13 and not a jurisdictional bar. Calderon v. United States District
14 Court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997), overruled in
15 part on other grounds by Calderon v. United States District Court
16 (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc).

17 Equitable tolling will not be available in most cases because
18 extensions of time should be granted only if "extraordinary
19 circumstances beyond a prisoner's control make it impossible to
20 file a petition on time." Id. Generally, "a litigant seeking
21 equitable tolling bears the burden of establishing two elements:
22 (1) that he has been pursuing his rights diligently, and (2) that
23 some extraordinary circumstance stood in his way." Pace, 544 U.S.
24 at 418.

25 Whether equitable tolling applies turns on an examination of

26 _____
27 violation hearing about his appeal.

1 detailed facts. Lott v. Mueller, 304 F.3d 918, 923 (9th Cir.
2 2002). See, e.g., Espinoza-Matthews v. California, 432 F.3d 1021,
3 1027-28 (9th Cir. 2005) (equitable tolling warranted for inmate's
4 eleven-month stay in administrative segregation because he was
5 denied access to legal papers despite his repeated requests for
6 them); Corjasso v. Ayers, 278 F.3d 874, 878 (9th Cir. 2002)
7 (equitable tolling warranted where delay was caused by
8 extraordinary circumstances beyond petitioner's control: district
9 court erroneously refused to accept petition for filing because of
10 technical deficiency in cover sheet and lost body of petition by
11 the time petitioner sent in corrected cover sheet).

12 The Due Process Clause of the Fourteenth Amendment guarantees
13 a criminal defendant the effective assistance of counsel on his
14 first appeal as of right. Evitts v. Lucey, 469 U.S. 387, 391-405
15 (1985).

16 B. Equitable Tolling -- Analysis

17 Petitioner argues that equitable tolling applies because he
18 has a constitutional right to the effective assistance of counsel
19 to file a notice of appeal, and trial counsel's ineffective
20 performance in not filing an appeal is an extraordinary
21 circumstance which should toll the statute of limitations. The
22 cases Respondent cites regarding attorney negligence involve filing
23 habeas petitions, for which there is no constitutional right to
24 counsel.

25 That Petitioner was unaware that the statute of limitations on
26 his right to collateral review was running because of counsel's
27 failure to timely file a notice of appeal constitutes the

1 extraordinary circumstances necessary for equitable tolling to
2 apply. Based upon Ms. Shamos' representations, Petitioner
3 reasonably assumed his appeal was ongoing, at least until February
4 1, 2006. Pet's Ex. A, Pet's Dec. at 1. On March 26, 2006, he
5 called the Sixth District Appellate project to inquire about the
6 status of his appeal and was told there was no pending appeal. Id.
7 From that time to the present, Petitioner has been working with the
8 Sixth District Appellate Program to try and regain his right to
9 appeal. Id. at 2. Mr. Couenhoven's testimony that he repeatedly
10 attempted to find Ms. Shamos, but was unable to speak with her
11 until October 24, 2006, lends support to the fact that Petitioner
12 diligently pursued his right to file an appeal. Petitioner's
13 actions meet the second requirement for equitable tolling, that he
14 diligently pursued his rights.

15 CONCLUSION

16 Accordingly, the statute of limitations on Petitioner's
17 petition for a writ of habeas corpus was equitably tolled from June
18 4, 2005 to February 1, 2006. Defendant's motion to dismiss based
19 on lack of timeliness is DENIED. (Docket # 9).

20
21 IT IS SO ORDERED.

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23 Dated: 8/12/08



24 CLAUDIA WILKEN
25 United States District Judge
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